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C O N F I D E N T I A L SECTION 01 OF 02 CARACAS 001197

SIPDIS

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TAGS: [ECON](#) [EFIN](#) [EINV](#) [PREL](#) [PGOV](#) [VE](#)  
SUBJECT: BRV SEEKS NULLIFICATION OF INTERNATIONAL  
ARBITRATION CLAUSE IN KEY INVESTMENT LAW

REF: CARACAS 648

Classified By: Economic Counselor Darnall Steuart for reasons 1.4 (b) and (d).

¶1. (SBU) Summary. Lawyers associated with the government filed a brief on June 12 before the Supreme Court seeking nullification of a key clause in Venezuela's Investment Law as well as a reinterpretation of the Constitution. Article 22 of Venezuela's Investment Law is currently interpreted to give access to international arbitration and has been cited by foreign investors. Once the court rules (in favor of the brief, we assume) any investor whose investment is not covered by a Bilateral Investment Treaty (BIT) will lose access to international arbitration. With the November 1, 2008 revocation of the Dutch BIT, investors seem to be looking at the Barbados and Spanish BITs. End Summary.

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LEGAL MANEUVERING TO AVOID INTERNATIONAL ARBITRATION  
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¶2. (SBU) On June 12, ten attorneys affiliated with the government (which included figures such as Hildegard Rondon de Sanso, Energy Minister Ramirez's mother-in-law) filed a brief with the Supreme Court (Court) requesting an interpretation of Article 258 of the Venezuelan Constitution. Acting on behalf of the BRV, the lawyers are seeking a constitutional interpretation that would end access to international arbitration now thought to be permitted by Article 22 of the Law on the Promotion and Protection of Investments (Article 22). Article 22, in force since December 1999, has been cited by investors, such as ExxonMobil, in their legal disputes with the BRV.

¶3. (SBU) Contrary to current practice, the brief asserts that Article 22 cannot supersede the expressed written consent of both parties and force international arbitration when the State is a party. The brief argues that such a compulsion would require the State to act in a manner contrary to its nature and objectives. The current practice is reasoned to be a violation of the Constitution as the Constitution solely provides for arbitration as an alternate method to resolve conflicts. The brief further argues that arbitration cannot be seen as a replacement for the Venezuelan judicial system and questions the impartiality of international arbitration institutions.

¶4. (SBU) On July 23, the Court acknowledged the legal basis for the brief and accepted it for consideration. As part of the judicial review process, the Court requested submission of additional interpretive briefs regarding the disputed clauses within five days from the Attorney General and Public

Defender's office. A limited period (five days) for public comment was provided. The Court stated the decision would be made public within 30 days of the closure of the public discussion period, without public hearings.

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BIT TREATIES WOULD STILL BE BINDING  
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15. (SBU) Any treaty signed by the BRV that includes an international arbitration provision would continue to be fully binding, although, as reported in reftel, the BRV acted in May to revoke its BIT with the Netherlands, which had proved to be a popular vehicle for foreign investors in Venezuela. The Dutch BIT will terminate on November 1, 2008, although it remains in force for 15 years for investments made before the date of revocation. Both ExxonMobil and ConocoPhillips are pursuing their arbitration cases before the World Bank's International Centre for Settlement of Investment Disputes (ICSID) under the Dutch BIT. According to a prominent local law firm, Venezuela has BITs with 24 other countries - the latest reportedly being one with Russia. In the wake of the revocation of the Dutch BIT, the law firm indicates that new investors seem to be looking particularly at the Barbados and Spanish BITs as possible vehicles to protect their access to international arbitration.

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COMMENT  
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CARACAS 00001197 002 OF 002

16. (C) With this latest legal maneuver, the BRV seeks to shrink the sole remaining access to international arbitration remaining in Venezuelan law. Post expects the Court to issue a constitutional interpretation nullifying the current interpretation of Article 22 within a few weeks. International private investors are already wary of making substantial new investments in Venezuela. Legal actions like this one will do little to reassure those who harbor doubts about the wisdom of becoming exposed in the Venezuelan economy - notwithstanding the fact that many investors continue to make money. End Comment.  
DUDDY